

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

Delaware Health Corporation d/b/a Harbor Health Care and
Rehabilitation Center

Employer

and

United Food and Commercial Workers International
Union, Local 27

Petitioner

CASE NO. 5-RC-16610

DATE OF MAILING December 3, 2010

AFFIDAVIT OF SERVICE OF DECISION AND DIRECTION OF ELECTION

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

REGULAR MAIL

Mr. Don Boger
Harbor Health Care and Rehab
301 Oceanview Blvd
Lewes, DE 19958

United Food and Commercial Workers
International Union, Local 27
21 West Road
Towson, MD 21204

Mark J. Swerdlin, Esq.
Shawe & Rosenthal LLP
20 S. Charles Street, 11th Floor
Baltimore, MD 21201

Joel A. Smith, Esq.
Kahn, Smith & Collins, P.A.
201 N. Charles Street, 10th Floor
Baltimore, MD 21201

Mr. Matt Russow
Organizer
United Food and Commercial Workers
International Union, Local 27
1501 Casho Mill Rd., Suite 11
Newark, DE 19711

Edward P. Wendel, Esq.
General Counsel
United Food and Commercial Workers Union,
(UFCW)
1775 K Street, NW
Washington, DC 20006-1598

Arthur M. Brewer, Esq.
Shawe & Rosenthal LLP
20 S. Charles Street, 11th Floor
Baltimore, MD 21201

Subscribed and sworn to before me on December 3, 2010.

DESIGNATED AGENT

Virian Brown

NATIONAL LABOR RELATIONS BOARD

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FIVE**

**DELAWARE HEALTH CORPORATION d/b/a
HARBOR HEALTH CARE AND REHABILITATION
CENTER,¹**

Employer

and

Case 05-RC-016610

**UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 27
Petitioner**

DECISION AND DIRECTION OF ELECTION

At issue in this case is whether the petitioned-for unit of approximately 65 certified nursing assistants (CNAs) is an appropriate unit for bargaining² or whether the smallest appropriate unit also must include approximately 40 activity aides, maintenance assistants, receptionists, and Dietary department employees (including porters, dietary aides, cooks, and Meals-on-Wheels aides). The Petitioner contends that the disputed classifications do not share a close community of interest with the petitioned-for classification of CNAs, and that the petitioned-for unit is an appropriate unit. The Employer contends that the disputed classifications of employees share a close community of interest with the petitioned-for unit, and that the appropriate unit is a “service and maintenance unit.” The parties stipulated at the hearing that any unit ultimately found appropriate would include CNAs, and exclude registered nurses (RNs)

¹ At the hearing, the parties agreed to amend the petition and formal papers to include the full and correct name of the Employer.

² At the hearing the Petitioner amended its petition to seek only CNAs, excluding the previously petitioned-for dietary employees.

and licensed practical nurses (LPNs).³ The parties further stipulated that there is no history of collective bargaining between the Employer and the Petitioner involving the Employer's facility in Lewes, Delaware.⁴ The parties also stipulated that there is no contract bar or any other bar that would preclude the processing of the petition at issue.

The Petitioner presented two witnesses at the hearing: (1) Donald Boger, facility administrator; and (2) Matt Russow, UFCW representative. The Employer presented three witnesses: (1) Michael Dacko, food service director; (2) James Marquardt, director of maintenance; and (3) Peggy Kemeys, activities director and coordinator.

I have carefully considered the evidence and arguments presented by the parties, at the hearing and on brief, regarding this issue. As discussed below, I conclude that the petitioned-for bargaining-unit must include the disputed classifications. Accordingly, I am directing an election in a unit that consists of all full-time and regular part-time certified nursing assistants, activity aides, maintenance assistants, receptionists, porters, dietary aides, cooks, and Meals on Wheels aides. There are approximately 105 employees in the unit found appropriate.⁵

³ At hearing, the parties agreed that RNs are professional employees and LPNs are technical employees, and that both classifications should be excluded from any unit found appropriate. Accordingly, I do not need to resolve the issue of whether RNs and/or LPNs are supervisors.

⁴ Russow testified that the United Food and Commercial Workers, Local 27 has a collective-bargaining agreement with an Employer's facility in Wilmington, DE. The collective-bargaining unit at that facility includes CNAs, dietary aides, and cooks. The unit does not include activity aides, receptionists, or maintenance personnel

⁵ Since the unit that I find appropriate is broader than the petitioned-for unit, the Petitioner is granted fourteen (14) days from the date of this Decision to make an adequate showing of interest, if necessary. Should the Petitioner not wish to proceed to an election in the broader unit it will be permitted, upon request, to withdraw its petition without prejudice.

To provide a context for my discussion of those issues, I will first provide a description of the Employer's operations. Then, I will set out the applicable law and explain why the petitioned-for unit is *not* an appropriate unit.

I. THE EMPLOYER'S BUSINESS OPERATIONS

The facility involved herein is a skilled nursing home in Lewes, Delaware. The facility is licensed as a skilled nursing facility by the State of Delaware. The Employer's facility has 178 beds divided into three units. All 178 beds are dually certified for Medicare and Medicaid patients. One unit, with approximately 60 beds, is referred to as "Lewes unit." The Lewes unit provides long-term care for residents. The Lewes unit has residents that suffer from dementia. Another unit with approximately 60 beds is referred to as "Sussex unit." The Sussex unit provides long-term care for residents. Another unit with approximately 60 beds is referred to as "Henlopen unit." The Henlopen unit provides short-term rehabilitation for residents. Each unit has a nurses' station. About 80% of the facility's patients are in long-term care, 20% in rehabilitation. At any time about five percent of the long-term patients of the facility are in hospice care, and one or two percent are in respite care. The facility is budgeted to have 28 nurses on duty during each 24-hour period. The State of Delaware requires that the facility at a minimum have one RN present 24 hours per day, seven days per week. In any given day, approximately one-third of the nurses present are RNs, and two-thirds are LPNs.

The facility's operations are divided by departments, including: (1) Nursing; (2) Activities; (3) Maintenance; (4) Dietary; (5) Administration; (6) Social Services; (7)

Housekeeping; (8) Therapy; and (9) Human Resources.⁶ The administrator of the facility is responsible for the entire facility's operations.⁷ Each department has a department director. All department directors report to the administrator of the facility.

Supervision of the employees is segmented by department. For example, employees in the nursing department (RNs, LPNs, and CNAs) are supervised by and report to the nursing administration. The nursing administration is comprised of a director of nursing, assistant director of nursing, and a staff development nurse. The nursing administration is responsible for hiring employees, evaluating employees during probationary periods, conducting employees' yearly evaluations, scheduling employees, assigning employees' tasks, disciplining employees, etc.

Each department director has the same responsibilities regarding his or her staff.⁸ The Activities department has nine employees. The Maintenance department is staffed by two unskilled maintenance assistants. The Dietary department has 28 employees. The Admissions department has no employees other than the director. Social Services has one employee below the director.⁹ The Human Resources Director supervises the receptionist. The Employer has approximately 200 employees of its own.

II. COMMON WORKING CONDITIONS

The facility's employees share a significant number of common working conditions. All employees work at the same, single-story facility. The Employer owns a large parking area immediately west of the facility. All employees are allowed to park in

⁶ The employees in housekeeping and therapy are not employees of the Employer. Those departments are outsourced.

⁷ Donald Boger testified that he is an employee of Cadia Healthcare. The Employer has contracted Cadia Healthcare to operate the Employer's facility.

⁸ Note: The nursing department is the only department that has an administration. The employees in dispute are supervised by one department director.

⁹ Neither party contends this employee should be included.

this parking area. There is an employee entrance located on the west side of the facility. Most of the employees use this entrance because it is where the time clock is located. All employees are required to record their arrival and departure times using the same electronic clock-in machine.

All employees at the facility must provide their own uniforms. For employees required to wear smocks or scrubs, they do not wear different color smocks to denote different job classifications. All employees are required by the State of Delaware to wear visible identification badges which identify the employees' name and position.

All employees have available for them a daily lunch and dinner option prepared by the kitchen, and offered at a discounted rate. The facility has four lounge areas. There is a large staff lounge area available to all employees, and unit lounge areas available to all employees. Individual job classifications are not assigned any particular time for using the lounge areas. Therefore, it is a daily occurrence for different employees from different job classifications to occupy a lounge area at the same time. In addition to the lounge areas, there is a gazebo on the property used by employees for meals and breaks. The gazebo is used by various employees in different job classifications at the same times. Most if not all employees are entitled to two 15 minute breaks, and one 30 minute meal break.

All employees are subject to one employee handbook, and the same rules and regulations described in the handbook.¹⁰ Further, all employees have the same health and welfare plans available to them.¹¹

¹⁰ Employer Exhibit 6 is the employee handbook describing the Employer's policies regarding time-off benefits, progressive disciplinary policies, attendance policies, etc. The handbook is titled Cadia Healthcare. Boger testified that this is the handbook provided to all employees, and all employees are subject to the policies in this handbook.

III. CERTIFIED NURSING ASSISTANTS (CNAs)

At the hearing, the parties stipulated that any appropriate unit would include CNAs. Boger testified that the job of a CNA is to provide personalized care to the residents of the facility. CNAs assist residents with their bathing, grooming, dressing, and feeding.¹² Documenting a resident's daily life, such as food in-take and output (toileting), is an essential function of a CNA. CNAs are not responsible for administering medications or ensuring compliance regarding medications.¹³ CNAs are not responsible for administering medications or ensuring compliance regarding medications.

There are approximately 50 CNAs working in any 24 hour period. A CNA is assigned to one of the three units; however, there are occasions where CNAs switch units. CNAs work throughout the facility in resident rooms, activities rooms, and dining areas. CNAs are scheduled according to one of three shifts. The shift times are 7:00 am to 3:00 pm, 3:00 pm to 11:00 pm, and 11:00 pm to 7:00 am. CNAs are paid on an hourly basis. CNAs' starting pay is \$10.50 per hour, and the pay for more experienced CNAs is upwards of \$20 per hour. CNAs wear smocks or scrubs as their uniforms. Boger testified that the supplies used by CNAs consist mainly of linen supplies and assorted food supplies.

Prior experience as a CNA is not a requirement for employment. As a minimum requirement for employment, CNAs are required to have a high-school diploma or its

¹¹ Employer Exhibits 3 and 4 are the full health and welfare benefits available to employees.

¹² Petitioner Exhibit 4 is a job description used by the Employer when hiring a CNA. The Exhibit is a more comprehensive list of essential functions of a CNA.

¹³ Petitioner's Exhibit 2, reflects that the State of Delaware defines a CNA as a duly-certified individual under the supervision of a licensed nurse, who provides care that does not require the judgment and skills of a licensed nurse. The care may include, but is not limited to, the following: bathing, dressing, grooming, toileting, ambulating, transferring and feeding, observing and reporting the general well-being of the person(s) to whom they are providing care.

equivalent. Further, CNAs are required to be certified by the State of Delaware as a prerequisite to employment. The state requires that an applicant for certification fulfill 75 hours of classroom training and 75 hours of clinical training. This training is completed before applicants are hired. After CNAs receive their certification, the state requires that newly hired CAN's participate in mandatory orientation at the Employer's facility. The State requires that the mandatory orientation be a minimum of 80 hours; 40 of those 80 hours must be clinical. For newly hired CNAs, the Employer provides approximately 20 hours of classroom training, and approximately 60 hours floor training. Boger testified that the 20-hour classroom training is offered about every 2 ½ weeks, and is not training exclusively for CNAs. Rather, the training is attended by employees from several departments. The employees are trained in policies and procedures of the facility, fire safety, infection control, etc. After CNAs have completed the classroom portion of the mandatory orientation, they complete their remaining 60 hours working along side a CNA in the units.

During CNAs' employment, the state requires that each CNA complete continuing education. CNAs are required to complete 24 hours of continuing education within a two year period. CNAs may fulfill their continuing education requirements by receiving training outside the Employer's facility. However, Boger testified that the Employer provides in-service training at the facility, which CNAs use to fulfill their continuing education requirements. The in-service trainings are attended by employees from several different departments, not only CNAs. The employees are paid for their time spent in the in-service training. In-service training covers topics such as abuse/neglect and hand washing.

When assisting residents with their bathing, grooming, dressing, and feeding, CNAs are required to keep records of this activity. Boger testified those record are kept in the resident flow books. Each resident has a flow book. The flow books are kept at the unit nurses' stations. CNAs make the majority of their notes and recordings in the flow books. The flow book describes whether residents need assistance, whether they can feed themselves, whether they need toilet assistance, etc. Also, the flow book is a daily recording of a residents' feeding, toileting, etc. CNAs are responsible for ensuring that flow books are as accurate and current as possible.

Boger testified that CNAs have daily interactions with all employees in the disputed job classifications. He testified they all work in and outside of the resident rooms, dining rooms, and common areas. While a CNA may be working with a particular patient, several employees may be present performing job duties.

IV. THE EMPLOYEES IN DISPUTE

The job classifications at issue are: (1) activity aides; (2) maintenance assistants; (3) receptionists; and (4) Dietary department (porters, dietary aides, cooks, and Meals on Wheels aides).

The following is a description of wages, hours, working conditions, and functional integration with CNAs of each job classification at issue, based on record evidence.

A. Activity Aides

The activity aides are responsible for providing social interaction and social activities for residents of the facility. An activity aide's job duties include assisting, planning, scheduling, directing, and performing activities for the residents of the

facility.¹⁴ Activity aides are responsible for keeping records and charting the activities of residents on a daily basis.

There are eight full-time activity aides and one part-time activity aide.¹⁵ As a minimum requirement for employment, activity aides are required to have a high-school diploma or its equivalent. Employment as an activity aide does not require state certification. Prior experience as an activity aide is not a requirement for employment. Activity aides are paid hourly. The record evidence regarding activity aides' wages demonstrates that activity aides are initially hired in a range of \$10 to \$12.50 per hour. Activity aides' pay can reach up to \$20 per hour. If activity aides work overtime, they are entitled to time and a half. Activity aides wear smocks or scrubs. During the week, activity aides either work the day shift (8:30 am – 4:30 pm) or night shift (12:30 pm – 8:30 pm). On weekends, they work the day shift only. On average, three activities aides work the dayshift, and one or two activities aides work the nightshift.

Activity aides perform the majority of their work at the facility. The facility has four activities rooms (two are also known as dayrooms). Each unit has an activities room, and the entire resident population can use the large social activities room. Activity aides spend approximately six out of eight hours per shift with residents in one of the activities rooms, or in a resident's room participating in activities. The remaining two hours are spent in the activities department office. On occasion activity aides participate in field trips with residents.

¹⁴ Petitioner Exhibit 5 is a job description used by the Employer. The exhibit has a more comprehensive list of activity aides' essential functions.

¹⁵ Boger testified that one activity aide is part-time, and also works part-time as a receptionist. The hearing officer asked the parties how the part-time activity aide should be classified for purposes of this proceeding. The Employer asserts she is properly considered to be a regular part-time activities aide for purposes of unit placement. The Petitioner's position is that both classifications should be excluded.

Activity aides have extensive interaction with CNAs. Each month the activities director creates an activities calendar.¹⁶ The calendar is monthly schedule of daily activities. When creating the calendar, the director solicits ideas from activity aides, CNAs, and other employees. Kemey testified that facility employees, often including CNAs, approach the director with suggestions for activities. On the first of each month, the activities calendar is provided to residents by activity aides and posted in the resident rooms. In addition to the calendar, residents are reminded of daily activities by activity aides going to the resident rooms to inform them of activities. Kemey testified that because there are so few activity aides, CNAs will split the unit's residents and assist activity aides by visiting residents to inform them of daily activities.

If residents with mobility issues desire to attend activities, both activity aides and CNAs will assist in transporting those residents to the activities rooms. When there is an insufficient number of activity aides to assist residents with transportation, aides may call CNAs to assist. Activities vary, and the role of the activity aide will vary depending on the activity. However, it is not uncommon for CNAs to attend or participate in activities. One daily activity is providing residents' coffee. During coffee, activity aides discuss current events with residents, or participate in board games. The activity aides make and serve the coffee, and CNAs will help transport residents to coffee, and often stay with the residents. Coffee is provided daily.

At the conclusion of an activity, activity aides and CNAs transport the residents back to their rooms. During resident outings, a bus is used to transport residents to a specific destination. An activity aide and a CNA attend the outing. If residents have

¹⁶ Petitioner Exhibit 7 is the November 2010 activities calendar.

mobility problems, activity aides and CNAs are responsible for assisting residents on and off the bus.

Activity aides record and chart each resident's participation in an activity. The recording is entered into the activities section of the patient's chart, located at the nurses' station. The patient charts also have sections for medical entries and dietary entries, to be made by nurses or dietary aides. The purpose of the charting is to document the interactions that a particular resident is receiving. The recordings factor into a patient's care plan. For example, if there is a significant change in a resident's condition, such as being bed-bound, this change is charted on a care plan so that in-room activities could be planned for that particular patient. The care plan is accessible to all employees. In addition to care plans, CNAs often discuss a particular resident's health and habits with activity aides.

Boger testified that if a resident had an emergency and a CNA was not present, an activity aide could help the resident. The help could be in any daily life activity. If this occurs, the activity aide is required to report that assistance to the CNA for recording in the flow book.

Three activity aides are certified by the State of Delaware as feeders. In order to obtain this certification, activity aides must complete a 12-hour training program. These activity aides assist residents who have difficulty eating independently. The certified feeders assist in feedings alongside CNAs in the dining areas, or day rooms. When a certified feeder assists a resident in feeding, he or she is responsible for recording the feeding in the flow book. There is no increase in pay for obtaining feeder certification.

B. Maintenance Assistants

Maintenance assistants help to maintain the facility in accordance with minimum facility requirements as mandated by the State of Delaware. Their job duties include fixing resident beds, wheelchairs, drywall, light bulbs, etc. Their work is performed throughout the facility, including resident rooms.¹⁷

There are two maintenance assistants at the facility. One maintenance assistant works 7:00 am to 3:30 pm, and the other works 8:30 am to 5:00 pm, Monday through Friday. Maintenance assistants may work weekends if there is an emergency. There are no educational requirements or certification necessary for employment. Marquardt testified that maintenance assistants are required to have general maintenance experience, including repairing, patching, minor electrical, etc. Maintenance assistants are paid hourly. Maintenance assistants are paid \$14 to \$16 per hour. Maintenance assistants are entitled to overtime if they work more than 40 hours in a week. In the performance of their duties, maintenance assistants use an assortment of tools, including hammers, screwdrivers, drills, etc. These tools are kept in the maintenance shop located on the premises.

Maintenance assistants learn of needed repairs by several methods. One method is by reviewing a maintenance log kept at each unit's nurses' station. Needed repairs are entered into the maintenance log by CNAs or any other employee. For example, a CNA may record that Ms. Smith needs a light bulb changed, or a TV repaired. Maintenance assistants review each unit's maintenance log approximately 5 times per day. Another method is by direct communication with CNAs or other employees. Marquardt testified

¹⁷ Petitioners Exhibit 9 is a job description used by the Employer. It has a more comprehensive list of the maintenance assistants' essential functions.

that maintenance assistants have daily face-to-face conversations or daily phone calls with CNAs or other employees informing them of needed repairs. After the maintenance assistants learn of needed repairs, they will get tools and parts, and go to wherever the repairs are needed. Generally, the repair is made in the resident's room, or an item such as a wheelchair may be taken back to the maintenance shop for repairs. When repairs are made in a resident's room, CNAs are needed to help transport or remove residents from their rooms in order for repairs to be completed. Maintenance assistants and CNAs must communicate in order for repairs to be completed in a safe and timely manner. Maintenance assistants often perform maintenance work in resident rooms while CNAs are with residents.

C. Receptionists

The Receptionist is the initial face of the facility. The receptionist desk is located at the front door of the facility. The receptionists' job duties include greeting visitors, answering the phone, disseminating information to particular units or departments, maintaining forms or diagrams (including the in-service records for CNAs continuing education), disseminating mail to employees, etc.¹⁸

There is one full-time and two part-time receptionists. The full-time receptionist's work hours are 7:00 am to 3:30 pm, Monday through Friday. One part-time receptionist's work hours are 10:00 am to 2:00 pm, Saturday and Sunday. As discussed above, the second part-time receptionist is also a part-time activities aide. Generally, this receptionist provides receptionist coverage from 3:30 pm to 7:00 pm, Monday through Friday. Receptionists are paid hourly. The full-time receptionist is paid

¹⁸ Petitioners Exhibit 8 is a job description used by the Employer. The exhibit has a more comprehensive list of the essential functions of a receptionist.

\$16 or \$17 per hour. The weekend receptionist is paid \$10 or \$11 per hour.

Receptionists are required to wear casual business attire.

The receptionist has frequent contact with all employees of the facility. For example, the receptionist is responsible for holding and disseminating paychecks to all employees. If mail comes to the facility, the receptionist is responsible for distributing the mail to the appropriate department director's mailbox. Also, receptionists are responsible for delivering residents' mail to the activities department, so that activity aides can distribute the mail to the residents. Boger testified that because of the work, employees at the facility are not permitted to receive phone calls or phone messages. However, if there is an emergency, the receptionist will take a message and then contact that employee, including CNAs, by going to the employees unit or by calling the unit.

With the receptionist desk located at the visitor entrance of the facility, receptionists are responsible for monitoring residents who enter and leave the building through the front entrance. Specifically, residents who suffer from dementia require monitoring. These residents have a wander guard system that signals an alarm if they get too close to the front door. In that instance, the receptionist is the first responder and is required to redirect the resident, disable the alarm, contact the particular unit, and if need be, walk the resident back to the unit. Generally, in these instances, the receptionist will contact a CNA.

D. Dietary Department

The Employer's facility has one kitchen and a large residents dining room. Also, each unit has a separate, smaller dining room (also used as activities rooms). Residents are provided three meals per day: breakfast at 7:30 am; lunch at 11:30 pm; and dinner at

5:00 pm. Breakfast is not served in the large dining room. Residents are provided three snacks per day, at 10:00 am, 2:00 pm, and 8:00 pm. Residents may eat their meals in one of the dining rooms, or in their personal room. The food menu is determined in advance, so each resident is aware of what is being served on any given day.

The Dietary department has approximately 28 employees in four job classifications: (1) porters; (2) dietary aides; (3) cooks; and 4) Meals on Wheels aides.

Porters provide assistance in dietary functions. Porters are responsible for delivering the meal trucks to each unit of the facility, stocking food orders, and washing dishes.¹⁹ There are three porters. Porters work either the dayshift (8:00 am to 4:00 pm) or the night shift (4:00 pm to 8:00 pm). One porter works the dayshift, and one porter works the nightshift. The third porter works an average of eight hours per week. Generally, the third porter is an extra hand for large food deliveries. There is no educational or experience requirement to be employed as a porter. There is no certification requirement. The porters are paid hourly. The porters' pay range is from \$8.50 to \$13 per hour. In the event that a porter works more than eight hours in a day, he or she will receive time and a half. Porters' work is conducted in the kitchen; however, the porters will work in the units when delivering meal trays.

The porters have daily interaction with the CNAs. Porters deliver meal carts to the units for breakfast, lunch, and dinner. The meal carts are loaded with 24 meal trays. Food, beverages, and utensils will be placed on the meal trays by dietary aides. The meal trays are put on the meal carts by dietary aides. On each delivery, the porter will ask the CNAs where they want the meal carts to be placed. Then, the CNAs will take the meal

¹⁹ Petitioner Exhibit 12 is a job description used by the Employer. The exhibit has a more comprehensive list of the essential functions of a porter.

trays off the cart and deliver them to the residents. After a resident is finished with his/her meal, a CNA will collect the tray, place it back on the meal cart, and deliver the meal cart back to the kitchen. Dacko testified that often, the meal cart is not full with meal trays, and a CNA will tell someone in the dietary department that there are meal trays in a resident's room. When meal trays remain in a resident's room, either the CNA or the porter will pick up the trays from the resident's room. Often, CNAs will call the kitchen and request a porter or other dietary aide to pick up a tray from a resident's room. If a CNA requests a dietary employee to pick up a tray from a resident's room, only the porter will pick up the tray.

There are 18 dietary aides. A dietary aide's job duties include preparing cold food, drinks, and snacks for residents, preparing meal trays, delivering snacks to the units, washing dishes, etc.²⁰ Dietary aides work from 6:00 am to 2:00 pm, or from 4:00 pm to 8:00 pm. There are dietary aides scheduled seven days per week. There is no educational or experience requirement to be employed as a dietary aide. There is no certification for dietary aides. Dietary aides are paid on an hourly basis. At hiring, dietary aides are paid \$8 to \$8.50 per hour. Some dietary aides make upwards of \$14 per hour. If a dietary aide works an excess of eight hours per day, the dietary aide is paid time and a half. Dietary aides wear smocks or scrubs as a uniform. All the dietary aides' duties are performed in the kitchen, except when they are delivering snacks to each unit at the facility.

Dietary aides have significant interaction with CNAs. Dietary aides are responsible for delivering snacks three times per day. Dietary aides deliver the snacks to

²⁰ Petitioner's Exhibit 10 is a job description used by the Employer. The exhibit has a more comprehensive list of essential job duties of a dietary aide.

the unit nurses station, and inform the CNAs that the snacks are ready to be delivered to the residents. CNAs then deliver the snacks to the resident. Almost daily, CNAs inform dietary aides that a particular resident's taste has changed, requiring a dietary aide to return to the kitchen and retrieve the resident's new snack. Dietary aides receive daily phone calls from CNAs to request an item for a resident, and an aide will then deliver the item. Sometimes, CNAs will visit the kitchen to inform the cooks or dietary aides of a change in a resident's diet. On a daily basis residents' dietary needs are communicated to the dietary aides by using communications slips. A communications slip provides detailed information such as a resident's allergies or whether a resident has a change of preference. The communications slip is created by employees in the nursing department, including CNAs, and then sent to the dietary aides in the kitchen. Also, a dietary aide visits each nurses' station every two hours in order to see if any communication slips have been created. When communications slips are created, that information is entered into the dietary section of the patient's chart located at the nurses' station. The record is not clear who enters this information into patient charts.

Dietary aides are responsible for bringing lunch and dinner to the residents who decide to eat in dining room areas. Dietary aides and CNAs are responsible for the dining room areas during meal times. Dietary aides and CNAs work together to serve meals directly to residents.

The facility has four cooks. The cooks' job duty is preparing meals for residents and employees. The cooks prepare the hot entrees and some cold plates. Cooks work 4:30 am to 12:30 in the afternoon (first shift), or 11:00 am to 7:00 pm (second shift), seven days per week. The cooks perform their duties in the kitchen. There is no

educational or certification requirement for employment. There is no experience requirement for cooks; however, if a cook has experience, he/she may be paid a higher wage. Cooks are paid on an hourly basis. Cooks' pay ranges from \$11 per hour to \$17 per hour. For time worked in excess of eight hours per day, a cook is paid time and a half.

CNAs will often go to the kitchen to pick up special meals requested by residents. It is common for residents to change their minds regarding a meal, and prefer a different meal. When this happens the CNAs often will speak directly to cook about this change. The cook will then prepare the meal.

The facility has a contract with Meals on Wheels. This contract is administered through the Dietary department. There are three Meals on Wheels aides. The Meals on Wheels aides are employees of the Employer. All of the Meals on Wheels aides are full-time employees. The aides are paid on an hourly basis, ranging from \$8 to \$14.50 per hour. The contract requires that Meals on Wheels aides help prepare hot and cold meals that are sent out through Meals on Wheels delivery trucks to individuals off-site. Meals on Wheels aides' job duties include preparing food and beverages, packaging food in containers, and delivering the meals to the Meals on Wheels delivery truck. The Meals on Wheels aides prepare all three meals per day, once per day, and ready those meals for pick up. Those meals are provided to the Meals-on-Wheels delivery truck once per day. In addition to preparing the Meals on Wheels meals, the aides are responsible for preparing and serving, to the facility's employees lunch and dinner each day. As necessary, the Meals on Wheels aides perform all the functions of the dietary aides.

V. ANALYSIS OF APPROPRIATE UNIT COMPOSITION

In *Park Manor Care Center, Inc.*, 305 NLRB 872, 878 (1991), the Board ruled that the proper test for determining the appropriateness of bargaining units in non-acute health care institutions, such as nursing homes, is an “empirical community of interest test.” Under that test, the Board considers traditional community of interest factors, as well as those factors considered relevant by the Board in its rulemaking proceedings on Collective-Bargaining Units in Health Care Industry, Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33900 (Sept. 1, 1988), reprinted at 284 NLRB 1528, and Final Rule, 54 Fed. Reg. 16336 (April 21, 1989), reprinted at 284 NLRB 1580. The Board stated that nursing homes require a higher degree of functional integration, thus resulting in a greater likelihood of a shared community of interests among staff. *Id.*, at 874. Further, the Board notes that there is a greater overlap of functions in nursing homes among nonprofessionals than there is in acute care hospitals. *Id.*

Generally, the Board seeks to avoid the proliferation of undue bargaining units in the health care field. *Id.* As stated in *Park Manor*,

The Board decided tentatively to eliminate the narrower units in favor of broader ones (in small hospitals and nursing homes) because it believed that in smaller facilities there would be less division of labor and specialization and thus more functional integration of employees' services than normally is the case in large hospitals.

Id.

In remanding *Park Manor* to the Regional Director in that case for application of this test, the Board observed that “if the employees excluded by the Regional Director could not themselves constitute a separate unit they must perforce be included in the broader unit”. *Id.*, at 877.

In evaluating whether positions share a community of interest, the Board considers common supervision; similarity in employees' skills and functions; similarity in the scale and manner of determining earnings; similarity in benefits and working conditions; contact among employees; degree of functional integration; interchange; geographical proximity; and the history of any collective bargaining involving the parties. See *Turner Industries Group, LLC*, 349 NLRB 428, 430 (2007); *Kalamazoo Paper Box Co.*, 136 NLRB 134, 137 (1962).

Having considered all of the above-named factors, I find that the petitioned-for unit is not an appropriate unit, and that a broader "service and maintenance unit" as urged by the Employer is the smallest appropriate unit. A CNA - only unit would unnecessarily lead to a proliferation of bargaining units, and would exclude employees who share a close community of interest with the CNAs.

CNAs and the employees in dispute share a close community of interest. While not sharing common immediate supervision, all employees at issue are paid hourly, have comparable rates of pay, attend the same mandated orientation, use the same parking lot, have access to the employee entrance, use the same time clock, take breaks in the same employee lounge or gazebo, are subject to the same employee handbook and the same policies and procedures, and are eligible for the same employee benefits. Some of the disputed employees perform some of the essential functions of a CNA, and almost all share activities in common with the CNAs. Moreover, CNAs and the disputed employees perform their job duties within the Employer's facility, as an integrated workforce.

In that regard, activity aides work with residents either in an activities room or in the residents' room. Regardless of where the activity is performed, a CNA is often participating in the activity, or assisting activity aides transport residents to an activity. Activity aides must document a resident's participation in an activity, just as CNAs must document a residents feeding and care. Those documentations are made at the nurses' station. It is not uncommon for activity aides to assist residents in functions usually assigned to CNAs, when a CNA is not present. When this occurs, the activity aide must communicate with the CNA to inform the CNA of the aide's assistance. Three of the activity aides are certified feeders and work alongside CNAs to assist residents who have difficulty eating independently, and then record the feedings in the flow books - - again, those same duties are preformed by CNAs.

The maintenance assistants have daily contact with all job classifications at the facility, especially CNAs. The requirement that they perform maintenance throughout the facility, including residents' rooms, frequent ensures contact and functional integration with CNAs. CNAs make daily updates to the maintenance logs kept at the nurses' station. The updates are constant, requiring the maintenance assistant to review the logs multiple times per day. In *Marion Manor for the Aged, Inc.*, 333 NLRB 1084, 1094 (2001), the Board found that maintenance employees who performed similar work, not requiring a high degree of skill or specialized training, properly are included in a "service and maintenance unit."

In *Lincoln Park Nursing Home*, 318 NLRB 1160, 1163 (1995), the Board reversed a decision by a Regional Director who excluded the nursing home receptionist as a business office clerical, holding that the receptionist should be included in a "service

and maintenance unit.” In deciding to include the receptionist, the Board considered the physical location of the receptionist. *Id.* at 1164. The record establishes that the Employer’s receptionists have daily interaction with employees throughout the facility. The receptionist’s desk is located at the visitors entrance, making her available at all times to employees within the facility. Naturally, her position makes her a natural source of disseminating information and communicating messages to employees. The receptionist is responsible for passing emergency messages to employees, disseminating mail, collecting packages, disbursing payroll checks or direct deposit stubs, and contacting staff, including CNAs, when certain residents are near the front door.

Employees in the Dietary department also have daily interactions with the CNAs. Constant communication is necessary between CNAs and dietary employees in order for residents to receive their proper meals. The CNAs must communicate to dietary employees where to deliver meals. CNAs must communicate with dietary employees when a particular resident’s meal preference has changed. When this occurs, dietary employees’ record the change in the patient charts located at the nurses station. Also, CNAs communicate with dietary employees when trays need to be retrieved from residents’ rooms. Not only is there interaction concerning resident meals, but also when CNAs eat lunch and dinner prepared by the dietary employees. The lunch and dinner options are served seven days per week.

The Petitioner emphasizes the State’s requirement that CNAs be certified. However, the training and certification required of CNAs is not so specialized that a distinct unit is appropriate. Several of the State’s requirements for CNAs are fulfilled by CNAs attending training sessions also attended by employees in the disputed job

classifications. These trainings are attended by the employees in dispute, and cover topics relevant to all employees such as abuse and neglect, hand-washing, fire safety, and resident rights. The Petitioner has failed to cite any case law in which a CNA - only unit was found appropriate, or any case law supporting the position that a certification such as that received by CNAs herein alone justifies a separate and distinct unit.

I find that the job skills of CNAs are not so specialized that a distinct and separate unit limited to them is appropriate. Boger testified that when CNAs are not present, activity aides assist residents with their daily activities. For example, activity aides assist residents if there is an accident in the presence of the aide, or when a resident request assistance and there are no CNAs present. In those circumstances, the aide will assist a resident just as would a CNA, and then communicate that assistance to the CNA. Activity aides who are certified feeders assist residents who can not eat independently just as do CNAs. Further, CNAs and dietary aides both serve snacks to the residents at the same time, and work together in the dining rooms during residents' meal times. Similarly, CNAs often return trays to the kitchen, just as porters retrieve the trays.

The small number of activity aides, maintenance assistants, porters, cooks, and Meals on Wheels aides; the integrated nature of the work; the frequency of contact; and the overlapping wages, close proximity of work stations, intertwining job mobility, and other shared working conditions, far outweigh the CNAs' separate immediate supervision and the State of Delaware's certification requirement.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accord with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union, United Food and Commercial Workers International Union, Local 27, is a labor organization as defined in Section 2(5) of the Act, and claims to represent certain employees of the Employer.
4. There is no prior history of collective bargaining between the Union and the Employer at the Harbor Health facility.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
6. The Employer, Delaware Health Corporation d/b/a Harbor Health Care and Rehabilitation Center, is a Delaware corporation with a place of business in Lewes, Delaware, and is engaged in the operation of a skilled nursing facility. During the past twelve (12) months, a representative period, the Employer has derived gross revenues in excess of \$100,000, and has purchased and received goods in excess of \$5,000 from points located outside the state of Delaware.
7. I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time certified nursing assistants, activity aides, maintenance assistants, receptionists, porters, dietary aides, cooks, and Meals on Wheels aides employed by the Employer at its Lewes, Delaware facility, excluding all office clerical employees, professional employees, technical employees, guards, and supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers International Union, Local 27. The date, time, and place of the

election will be specified in the notice of election that the Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of issuance of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have

access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of the issuance of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.) Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, 103 South Gay Street, 8th Floor, Baltimore, MD 21202, on or before **December 10, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website www.nlr.gov, by mail, by hand or courier delivery, or by facsimile transmission at (410) 962-2198. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential

voters for at least three (3) working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **December 17, 2010**, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and

Regulations precludes acceptance of a request for review by facsimile transmission.

Upon good cause shown, the Board may grant special permission for a longer period within which to file.²¹ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL)

/s/ Wayne R. Gold

Dated: December 3, 2010

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
103 S. Gay Street, 8th Floor
Baltimore, MD 21202

²¹ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.